

PRESERVING TERRITORIAL *STATUS QUO*:
GROTIAN LAW OF NATURE, BASELINES AND
RISING SEA LEVEL

VIRGINIE BLANCHETTE-SÉGUIN*

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Frontiers are indeed the razor's edge on which hang suspended the modern issues of war and peace, of life or death to nations.

—Lord Curzon of Kedleston¹

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1. LORD CURZON OF KEDLESTON, *FRONTIERS* 7 (1907). Viceroy and Governor-General of India (January 6, 1899–November 18, 1905) and British Secretary of State for Foreign Affairs (October 23, 1919–January 22, 1924).

I. INTRODUCTION: LEGAL UNCERTAINTY SURROUNDING MARITIME BOUNDARIES IN THE CONTEXT OF RISING SEA LEVEL

Global warming is causing a slow but ineluctable rise in the sea level. The progressive temperature increase around the globe conduces, *inter alia*, to the melting of continental glaciers and dilatation of ocean water.² The direct result is some level of coastal inland retreat in most littoral areas. Faced with rising sea levels, the international community currently finds itself in a quandary: in addition to having to grapple with monumental environmental and humanitarian challenges, it must cope with the now uncertain maritime boundaries of numerous coastal States whose shorelines have begun to recede.

Despite the avowed aim of the ambitious drafters of the United Nations Convention on the Law of the Sea (UNCLOS) to settle “all issues relating to the law of the sea,”³ UNCLOS fails to provide whether established baselines—which are the departing point for calculating the width of States’ maritime territories—can be maintained in light of coastline inland retreat.⁴ This shortcoming comes as no surprise, for the text of UNCLOS was negotiated during the 1970s when the significant and general regression of coastlines due to global warming was not yet foreseeable.⁵

2. See Clive Schofield & Andi Arsana, *Climate Change and the Limits of Maritime Jurisdiction*, in CLIMATE CHANGE AND THE OCEANS 127, 128–29 (Robin Warner & Clive Schofield, eds. 2012) (“The warming of the ocean’s surface waters leads them to expand, and this, in turn, translates to a rise in sea level. The other major cause of sea-level rise suggested is the melting of glaciers and grounded ice sheets (as opposed to those floating on the ocean).”) (citation omitted); see also Alfred H.A. Soons, *The Effects of a Rising Sea Level on Maritime Limits and Boundaries*, 37 NETH. INT’L L. REV. 207, 207 (1990) (“Th[e] melting water [from glaciers] enters the ocean, which results, in combination with the expansion of sea water as a consequence of its higher temperature, in a rising of the sea level.”).

3. United Nations Convention of the Law of the Sea, pmbl., Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

4. See, e.g., David D. Caron, *When Law Makes Climate Change Worse: Rethinking the Law of Baselines in Light of a Rising Sea Level*, 17 ECOLOGY L.Q. 621, 634 (1990) [hereinafter Caron, 1990] (“UNCLOS III does not expressly provide that boundaries shall move with the baselines. It does do so, however, by negative implication.”).

5. David D. Caron, *Climate Change, Sea Level Rise and the Coming Uncertainty in Oceanic Boundaries: A Proposal to Avoid Conflict*, in MARITIME BOUNDARY DISPUTES, SETTLEMENT PROCESSES, AND THE LAW OF THE SEA 1, 10

Numerous authors take the predominant position, construing UNCLOS provisions as implying that baselines must follow the actual evolution of the coast,⁶ the so-called “moving baselines thesis.” Conversely, other commentators opine that UNCLOS implies that the established baselines are fixed and will remain effective irrespective of the submersion of coastal areas due to the rising sea level,⁷ known as the “fixed baselines thesis.” However, these interpretative arguments remain, in my opinion, inconclusive, as the text of UNCLOS does not decidedly exclude either of the two possibilities.⁸ Though reasonable persons may disagree on the following proposition, for the purposes of this Note, the working hypothesis is that UNCLOS provisions are inconclusive about the fixed or moving character of baselines.

In a previous article, I argued that established baselines could be maintained under the current state of international law and that this route should be preferred to the moving baselines thesis, notably for policy reasons.⁹ The fixed baseline thesis avoids, *inter alia*, the deleterious legal and political consequences associated with the moving baseline thesis, including legal uncertainty regarding navigation and exploitation

(Seoung-Yong Hong & Jon M. Van Dyke eds., 2009) [hereinafter Caron, 2009] (“[T]he conference of experts who met throughout the 1970s did not anticipate that there could be a significant regression of coastlines generally.”); Rosemary Rayfuse, *Whither Tuvalu? International Law and Disappearing States*, 9 U. N.S.W. L. RES. PAPER 1, 5 (2009) (“Hindsight is always 20/20. With hindsight it is easy to suggest that the LOSC negotiators should have considered the effects of sea level rise on the legal regime they were crafting and provided rules covering its eventuality. That the issue was not considered in the 1970s is, however, no reason not to consider it now . . .”).

6. E.g. Caron, 1990, *supra* note 4, at 635; Caron, 2009, *supra* note 5, at 10; Soons, *supra* note 2, at 216; David Freestone, *International Law and Sea Level Rise*, in INTERNATIONAL LAW AND GLOBAL CLIMATE CHANGE 109, 110–12 (Robin Churchill & David Freestone eds., 1991).

7. See, e.g., D. C. KAPOOR & ADAM J. KERR, A GUIDE TO MARITIME BOUNDARY DELIMITATION 31 (1986).

8. Apart from the construction of UNCLOS provisions, other legal arguments have been advanced to support the moving baseline and the fixed baseline theses. It is, however, beyond the scope of this note to analyse them. For a discussion of these arguments, see Virginie Blanchette-Séguin, *Élévation du Niveau de la Mer et Frontières Maritimes: Les États Possèdent-ils des Droits Acquis sur Leur Territoire Submergé?*, 26 REVUE QUÉBÉCOISE DE DROIT INT'L 1 (2013).

9. *Id.* at 12–16.

rights over natural resources, the incentive for coastal States to spend staggering amounts of public money to artificially protect their shorelines, and the creation of political tensions between States.¹⁰

In this note, I explore how the work of the Dutch legal theorist, poet, classical scholar, theologian, and diplomat Hugo Grotius¹¹ (1583 – 1645) can inform this debate. Specifically, I discuss how the Grotian law of nature favors territorial stability and can support the fixed baselines thesis.

In Section II, I explain why Grotius's famous position in favor of the freedom of the sea does not contradict the fixed baselines thesis. In Section III, I introduce the historical context of Grotius's oeuvre and highlight why the notion of territory was central to his work. In Section IV, I describe how Grotius treated property and sovereignty in the same manner. In Sections V and VI, I respectively deal with the means to acquire and lose territorial rights according to Grotius's theory of property. In so doing, I establish why coastal States have acquired rights over their maritime territories and should not lose those rights because of sea level rise. In Section VII, I demonstrate that the respect of States' expectations, which was crucial for Grotius, warrants the adoption of the fixed baselines thesis. In Section VIII, I argue that the fixed baselines thesis would moreover ensure international peace and order, which are fundamental goals of Grotius's legal theory. Finally, I explain why the intuitive argument in favor of the fixed baselines thesis based on the concept of the sovereign equality of States does not, however, find support in Grotius's work.

II. PRELIMINARY WORDS: GROTIUS AND OWNERSHIP OF THE SEA

Before delving into the subject of this paper, I first explain why Grotius's position in favor of the freedom of the sea does not contradict the fixed baselines thesis.

10. *Id.* at 8–11.

11. Born "Huig de Groot," he preferred to use the Latinized version of his name "Hugo Grotius" because Latin was the scholarly language of his time. CHARLES S. EDWARDS, HUGO GROTIUS, THE MIRACLE OF HOLLAND: A STUDY IN POLITICAL AND LEGAL THOUGHT 183 (1928).

In *Mare liberium* (“The Freedom of the Seas” or “The Free Sea”), one of his most famous pieces,¹² Grotius notoriously championed freedom of the sea from national appropriation.¹³ At first glance, *Mare liberium* may appear to support the moving baseline thesis, which generally favors the maximization of the size of the high seas. In other words, if established baselines were to follow coastline inland retreat, the vast majority of coastal States would lose maritime territories.¹⁴ Therefore, one may find it counterintuitive to read Grotius’s work as supportive of the fixed baseline thesis, which would effectively favor coastal States’ maritime claims.

However, Grotius’s stand for the freedom of the sea must be read in context. *Mare liberium* was, in reality, a plea in support of freedom of trade, as suggested by its subtitle: “The Right Which Belongs to the Dutch to Take Part in the East Indian Trade.”¹⁵ This essay was a response to Portugal and Spain’s¹⁶ claims of monopoly on the East Indian trade and, accessorially, on the whole ocean crossed by European ships to get there.¹⁷ At that time, maritime navigation was the neces-

12. With this pamphlet published anonymously in 1608, Grotius’s objective was apparently to provide legal support to the position of his patron of the day, the Dutch East India Company, against Spain’s territorial claims. W. E. Butler, *Grotius and the Law of the Sea*, in HUGO GROTIUS AND INTERNATIONAL RELATIONS 209, 210 (Hedley Bull et al. eds., 1990); Benedict Kingsbury, *A Grotian Tradition of Theory and Practice?: Grotius, Law, and Moral Skepticism in the Thought of Hedley Bull*, 17 QUINNIPIAC L. REV. 3, 6 (1997).

13. HUGO GROTIUS, THE FREEDOM OF THE SEAS 7 (James Brown Scott ed., Ralph van Deman Magoffin trans., Oxford Univ. Press 1916) (1608) [hereinafter GROTIUS, THE FREEDOM OF THE SEAS].

14. Some adjacent and opposite States to the State whose coasts are receding may *gain* maritime territories. However, this effect would be marginal as compared with the global effect of territorial loss suffered by the majority of coastal States. In addition, States that would gain maritime territories because of baseline shifts would solely do it at the expense of the territorial losses of other coastal States, so this phenomenon would have no impact on the high seas.

15. Ralph van Deman Magoffin’s translation of the original subtitle in Latin: “*De iure quod Batavis competit ad Indicana commercia, dissertatio.*” GROTIUS, THE FREEDOM OF THE SEAS, *supra* note 13.

16. The two countries were joined in a royal union at that time (from 1580 to 1640). Tullio Scovazzi, *The Origin of the Theory of Sovereignty of the Sea*, in LAW OF THE SEA, FROM GROTIUS TO THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA 48, 58 (Lilian del Castillo ed., 2015).

17. GROTIUS, THE FREEDOM OF THE SEAS, *supra* note 13, at vi–vii.

sary medium to exercise trade with distant lands.¹⁸ Therefore, the freedom of the sea, the freedom of navigation, and the freedom of trade were inexorably interconnected. It is in this context that Grotius stated, “[N]o part of the sea can be considered as the territory of any people whatsoever.”¹⁹ Grounding his argument in the authority of reason, Grotius asserted that the sea was common to all people because, just like the air, its limitless character made it impossible to possess.²⁰

Given the preponderant commercial reasons behind Grotius’s argument in favor of the freedom of the sea, *Mare liberum* must be read in light of today’s legal realities. In contrast to the context in which Grotius wrote, precise rights on delimited maritime territories have now been universally allocated to coastal States,²¹ ships flying all flags have a right of innocent passage through the territorial sea of other States²² (*inter alia* for international trade purposes), and ships today enjoy free-

18. M. C. W. Pinto, *Hugo Grotius and the Law of the Sea*, in *LAW OF THE SEA, FROM GROTIUS TO THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA*, *supra* note 16, at 18, 27–28.

19. Grotius came to this conclusion building on Roman law principles relative to common property. GROTIUS, *THE FREEDOM OF THE SEAS*, *supra* note 13, at 34. However, it is noteworthy that Grotius made some exceptions to the impossibility of appropriating the sea in *De jure belli ac pacis*. For instance, he stated that “Property and Dominion of the Sea might belong to him who is in Possession of the Lands on both Sides . . . provided that it is not a great Part of the Sea” HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE*, at 460 (Richard Tuck ed., Richard Tuck trans., 2012) (1625) [hereinafter GROTIUS, *THE RIGHTS OF WAR AND PEACE*].

20. GROTIUS, *THE FREEDOM OF THE SEAS*, *supra* note 13, at 28. In addition, Grotius considered the sea as being so vast that it would “be sufficient for all the Uses that Nations can draw from thence, either as to Water, Fishing, or Navigation.” GROTIUS, *THE RIGHTS OF WAR AND PEACE*, *supra* note 19, at 428.

21. In all likelihood, the territorial rights provided for in UNCLOS have now acquired a customary status binding on every State. For the general requirements for a conventional rule to become a rule of customary international law, see *North Sea Continental Shelf* (Ger. v. Den.; Ger. v. Neth.), Judgment, 1969 I.C.J. Rep. 43–44, ¶ 73–74 (Feb. 20).

22. UNCLOS, *supra* note 3, at art. 17. It is interesting to note that Grotius was a fervent advocate of the right of freedom of transit through other States’ land and maritime territories. GROTIUS, *THE RIGHTS OF WAR AND PEACE*, *supra* note 19, at 439 (“So likewise a free Passage ought to be granted to Persons where just Occasion shall require, over Lands and Rivers, or such Parts of the Sea as belong to any Nation.”); see also CRISTOPH A. STUMPF, *THE GROTIAN THEOLOGY OF INTERNATIONAL LAW: HUGO GROTIUS AND THE MORAL FOUNDATIONS OF INTERNATIONAL RELATIONS* 193 (2006).

dom of navigation in all States' Exclusive Economic Zone (EEZ)²³ as well as on the high seas.²⁴

Furthermore, Grotius himself softened his position concerning the freedom of the sea in a subsequent text. Indeed, Grotius accepted that coastal States may have jurisdiction over a small sea belt adjoining their land territories, albeit without having a sovereign title over it.²⁵ Grotius then conceived of this limited maritime jurisdiction as the continuation of the State's jurisdiction over its land territory.²⁶

Finally, towards the end of his life, Grotius conceded that the real issue was how to determine the position of maritime boundaries between coastal waters and the high seas.²⁷ He therefore accepted that at least portions of coastal waters were subject to some occupation by States. For these reasons, when reading Grotius's oeuvre for foundations for the fixed baselines thesis, one should not be overly concerned with his opposition to sovereign title over maritime territories.²⁸

23. UNCLOS, *supra* note 3, at art. 58, ¶ 1.

24. *Id.* at art. 87, ¶ 1(a).

25. GROTIUS, THE RIGHTS OF WAR AND PEACE, *supra* note 19, at 466–69 (“But it was more easy to take Possession of the Jurisdiction only, over some Part of the Sea, without any Right of Property: Nor do I think, that that Law of Nations, of which we have spoken, did any Ways oppose or contradict it.”).

26. GIOVANNI DISTEFANO, L'ORDRE INTERNATIONAL ENTRE LÉGALITÉ ET EFFECTIVITÉ : LE TITRE JURIDIQUE DANS LE CONTENTIEUX INTERNATIONAL 30 (2002).

27. Scovazzi, *supra* note 16, at 61 (citing a 1637 letter from Grotius to Monsieur de Reigersberg published in 8 BRIEFWISSELING VAN HUGO GROTIUS 303 (P. C. Molhuysen ed., 1928)).

28. Be that as it may, much remains of Grotius's idea of the freedom of the sea in international law today. Indeed, territorial claims of coastal States stand as circumscribed exceptions to the general principle of freedom of the high seas. *See, e.g.*, UNCLOS, *supra* note 3, at art. 89 (providing that “[n]o State may validly purport to subject any part of the high seas to its sovereignty”); *Id.* at art. 136 (declaring that the seabed beyond national jurisdiction is “the common heritage of mankind.”). These two UNCLOS articles are a legacy of the Dutch jurist. All in all, Grotius can fairly be said to “have won the battle” against the voracious maritime claims he witnessed during his era. Scovazzi, *supra* note 16, at 62; *see also* Butler, *supra* note 12, at 219; STUMPF, *supra* note 22, at 179, 198.

III. THE WESTPHALIAN SYSTEM: A SOCIETY OF SOVEREIGN STATES GOVERNED BY LAW

The fixed or moving character of baselines has a direct impact on the integrity of coastal States' maritime territories. To analyze how Grotius's ideas apply to the territorial issues resulting from uncertain and changing baselines, it is first useful to explain the historical imperatives driving his work. Indeed, these considerations deeply permeate his conception of territory and of the importance of stability of boundaries.

Between May and October 1648, various Catholic and Protestant States of continental Europe signed a collection of treaties to put an end to the Thirty Years' War. Commonly referred to collectively as the "Peace of Westphalia," these treaties are often viewed as the point marking the entry of international law into modernity. Turning the page on three bloody decades,²⁹ the Peace of Westphalia settled numerous States' property claims, thus bringing some territorial stability to Europe. Most importantly, moving away from the chaotic medieval order, the States Parties agreed to respect one another's territorial integrity. The Peace of Westphalia thereby "legitimated the right of sovereigns to govern their peoples free from outside interference."³⁰ Therefore, 1648 created—at least in a symbolic fashion³¹—a new international system with

29. By way of illustration, "some estimates are that half of Germany died in war, siege, starvation, pillage and disease." Mark W. Janis, *Sovereignty and International Law: Hobbes and Grotius*, in *ESSAYS IN HONOUR OF WANG TIEYA* 391, 393 (Ronald St. John Macdonald ed., 1994) [hereinafter Janis, *Sovereignty and International Law*].

30. *Id.*

31. See Benedict Kingsbury & Adam Roberts, *Introduction: Grotian Thought in International Relations*, in *HUGO GROTIUS AND INTERNATIONAL RELATIONS*, *supra* note 12, at 1 ("[Grotius's] writings also engage the changing structures of political power in Europe: . . . [including] the gradual emergence of an international system of sovereign states, linked symbolically to the 1648 Peace of Westphalia."); SURYA P. SHARMA, *TERRITORIAL ACQUISITION, DISPUTES AND INTERNATIONAL LAW* 5 (1997) ("Although the idea of territory was an essential component in the sovereignty of a geographically-based community was known even to the ancient Greeks and the Romans, it was not until the Peace of Westphalia (1648) that a system of sovereign states based on defined territorial units was introduced symbolizing as it were a starting point in the formation of the modern international legal order.").

the concept of States' territorial sovereignty as its cornerstone.³²

Although some scholars argue that the Grotian legacy has been amplified and distorted over the centuries,³³ many commentators believe that the theoretical foundations essential to the Peace of Westphalia were introduced in Grotius's legal masterpiece *De jure belli ac pacis* ("The Rights of War and Peace"), published in 1625.³⁴ More specifically, his work arguably facilitated the reconciliation of two ideas that were previously considered antagonistic: (1) the exclusive sovereignty of the emerging modern States and (2) the concept of international law (i.e., a body of external rules that govern States' be-

32. Janis, *Sovereignty and International Law*, *supra* note 29, at 393. As the philosopher Raymond Aron put it, since the Peace of Westphalia, "[e]ach international order, to the present day, has been essentially territorial. It reflects an agreement between sovereigns, a compartmentalization of space." RAYMOND ARON, *GUERRES ET PAIX ENTRE LES NATIONS* 187 (1984) ("Tout ordre international, jusqu'à nos jours, a été essentiellement territorial. Il consacre un accord entre des souverainetés, le compartimentage de l'espace.") (author's translation).

33. Kingsbury, *supra* note 12, at 10; *see also* Kingsbury & Roberts, *supra* note 31, at 2–3 (citing PETER HAGGENMACHER, *GROTIUS ET LA DOCTRINE DE LA GUERRE JUSTE* (1983)).

34. *See* MICHAEL P. SCHARF, *CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE: RECOGNIZING GROTIAN MOMENTS* 3–4 (2013); MARY ELLEN O'CONNELL, *THE POWER AND PURPOSE OF INTERNATIONAL LAW: INSIGHTS FROM THE THEORY AND PRACTICE OF ENFORCEMENT* 3, 5, 12 (2008); Georges Abi-Saab, *Grotius as a System-builder: The Example of the "Jus ad Bellum"*, in *GROTIUS ET L'ORDRE JURIDIQUE INTERNATIONAL* 80, 87 (Alfred Dufour et al. eds., 1983); EDWARDS, *supra* note 11, at xv; JAMES T. JOHNSON, *SOVEREIGNTY: MORAL AND HISTORICAL PERSPECTIVES* 1 (2014); John T. Parry, *What is the Grotian Tradition in International Law?*, 35 *U. PA. J. INT'L L.* 299, 301 (2013); I agree that the "foundational structure of modern international law emerged over a long period, doctrinal responsibility being collegiate and owing a great deal to other developments" as argued in Kingsbury & Roberts, *supra* note 31, at 49. However, I simply suggest here that Grotius's work has been instrumental in this development and has a strong symbolic importance. As beautifully put by Georges Abi-Saab, "in the realm of social philosophy and social thought in general (in which [Abi-Saab] include[s] law), there is no place for a 'big bang' theory of creation, and that—in varying degrees, it is true—all authors are cannibals, using the ideas of others as building blocs for their own." Abi-Saab, *supra* note 34, at 80.

haviors).³⁵ For this reason, Grotius is frequently referred to as the “father” or “founder”³⁶ of modern³⁷ international law.

Grotius’s major contribution to the development of international law relates to his conception of law regulating relations between sovereign States.³⁸ In *De jure belli ac pacis*—written while the Thirty Years’ War was underway—Grotius’s stated objective was to specify in what circumstances, and in what manner, States may justly make war.³⁹ Nevertheless, far from having its impact limited to the law of war, this seminal treatise had far-reaching reverberations and, according to some authors, contributed to the “formation of international

35. Janis, *Sovereignty and International Law*, *supra* note 29, at 399; Cornelius F. Murphy, Jr., *The Grotian Vision of the World Order*, 76 AM. J. INT’L L. 477, 480 (1982).

36. Notably by Hersch Lauterpacht, *The Grotian Tradition in International Law*, 23 BRIT. Y.B. INT’L L. 1, 18 (1946) [hereinafter Lauterpacht, *The Grotian Tradition*]. See also, e.g., John D. Haskell, *Hugo Grotius in the Contemporary Memory of International Law: Secularism, Liberalism, and the Politics of Restatement and Denial*, 25 EMORY INT’L L. REV. 269, 269 (2011); Mark W. Janis, *Religion and the Literature of International Law: Some Standard Texts*, in RELIGION AND INTERNATIONAL LAW 121, 121 (Mark W. Janis & Carolyn Evans eds., 1999); SUZANNE LALONDE, DETERMINING BOUNDARIES IN A CONFLICTED WORLD: THE ROLE OF *Uti Possidetis* 17 (2002); Pinto, *supra* note 18, at 19.

37. The qualifier “modern” is necessary since a system of viable rules governing the relationships between self-conscious political entities can be traced at least as far back as the ancient Greece, where city-states engaged in activities typically associated with statehood, such as conquering and possessing territories. These relationships are however perhaps better described as “intermunicipal” rather than “international” because of the “racial, cultural, lingual, and religious homogeneity” among the people of city-states. See EDWARDS, *supra* note 11, at 71.

38. This is opposed to a theory of the State in the tradition of such philosophers as Thomas Hobbes or Jean Bodin. Patrick Riley, *The Legal Philosophy of Hugo Grotius*, in A TREATISE OF LEGAL PHILOSOPHY AND GENERAL JURISPRUDENCE 11, 12 (Enrico Pattaro et al. eds., 2009); SCHARF, *supra* note 34, at 4 (“[T]he prevailing view today is that [Grotius’s] treatise had an extraordinary impact as the first formulation of a comprehensive legal order of interstate relations based on mutual respect and equality of sovereign states. In ‘semiotic’ terms, the ‘Grotian tradition’ has come to symbolize the advent of the modern international legal regime, characterized by a community of states operating under binding rules, which arose from the 1648 Peace of Westphalia.”).

39. GROTIUS, THE RIGHTS OF WAR AND PEACE, *supra* note 19, at Book I, Preliminary Discourse § XXIX.

law as a distinct discipline.”⁴⁰ Building on a systematic reassembling of heterogeneous practices and authorities, Grotius developed the notion of a “law of nature” that is binding on all nations because of its intrinsic justice⁴¹ as opposed to divine origin.⁴² Instead, Grotian law of nature is grounded in man’s rationality and innate sociability.⁴³ Grotius thereby sought to appeal to the “moral principles that would hold sway over the will of all mankind” and would overcome the separateness and independence of the different States.⁴⁴ He even went as far as to suggest the possibility of a secular theory of rights.⁴⁵

40. *Id.* at xi; see also Lauterpacht, *The Grotian Tradition*, *supra* note 36, at 2 (qualifying Grotius as, *inter alia*, the “acknowledged greatest exponent of the law of nations”).

41. Riley, *supra* note 38, at 12.

42. This was a daring proposition at the time. See generally ERNEST BARKER, *TRADITION OF CIVILITY* 11 (1948); ERNST CASSIRER, *THE MYTH OF THE STATE* 165–72 (1946); Haskell, *supra* note 36, at 271; Janis, *Sovereignty and International Law*, *supra* note 29, at 394–95; Josef L. Kunz, *Natural-Law Thinking in the Modern Science of International Law*, 55 AM. J. INT’L L. 951, 951–52 (1961); GEORGE H. SABINE, *A HISTORY OF POLITICAL THEORY* 416–26 (1961).

43. Or, in Grotius’s words, in his “Desire of Society, that is, a certain Inclination to live with those of his own Kind, not in any Manner whatever, but peaceably.” GROTIUS, *THE RIGHTS OF WAR AND PEACE*, *supra* note 19, at 79–81; see also EDWARDS, *supra* note 11, at 47; Peter Haggemacher, *Grotius et le Droit International—le Texte et la Légende*, in GROTIUS ET L’ORDRE JURIDIQUE INTERNATIONAL, *supra* note 34, at 115, 120; Hidemi Suganami, *Grotius and International Equality*, in HUGO GROTIUS AND INTERNATIONAL RELATIONS, *supra* note 12, at 221, 223.

44. Murphy, *supra* note 35, at 482.

45. He suggested that the law of nature would be valid “though we should even grant, what without the greatest Wickedness cannot be granted, that there is no God, or that he takes no Care of human Affairs.” GROTIUS, *THE RIGHTS OF WAR AND PEACE*, *supra* note 19, at 89. This possibility of a secular theory of rights mentioned by Grotius had an important influence on subsequent political thought. STEPHEN BUCKLE, *NATURAL LAW AND THE THEORY OF PROPERTY: GROTIUS TO HUME* 23 (2002). However, it must be mentioned that Grotian law of nature was still tied to religious considerations, since, although it was not the direct product of a divine commend, it reflected the divine providence enshrined in the internal constitution of men. See, e.g., GROTIUS, *THE FREEDOM OF THE SEAS*, *supra* note 13, at 53 (“For, since the law of nature arises out of Divine Providence, it is immutable.”), *Id.* at 2 (“He had drawn up certain laws not graven on tablets of bronze or stone but written in the minds and on the hearts of every individual, where even the unwilling and the refractory must read them.”); GROTIUS, *THE RIGHTS OF WAR AND PEACE*, *supra* note 19, at 91 (“And even the Law of Nature itself, whether it be that which consists in the Maintenance of Society, or that which in a looser Sense is so called, though it flows from the

Because the Grotian law of nature is rooted in reason and human nature, it is neither arbitrary nor tied to a specific religion.⁴⁶ Accordingly, it had the potential to constitute a universal, uniform, and immutable set of rules which would, according to Grotius, lead to the long-term advantage of each State.⁴⁷ Indeed, Grotius, who was also a diplomat, believed that States—just like individuals—naturally rely upon communities constituted of their peers to ensure their wellbeing, and that no community could possibly exist without law.⁴⁸

In the explosive European political environment before the Peace of Westphalia, where neither an Emperor nor the Church could be counted on to moderate international conflicts,⁴⁹ there was a dire need for States to show self-restraint, especially with respect to the use of force.⁵⁰ For this reason,

internal Principles of Man, may notwithstanding be justly ascribed to God, because it was his Pleasure that these Principles should be in us.”); see also EDWARDS, *supra* note 11, at 47 (“[E]ven though Grotius . . . freed natural law theory from its traditional medieval tie, he was not a secularist . . . because he retained theological presuppositions in his thought and, like Aquinas, stressed the dependence of man on the divine order.”).

46. BUCKLE, *supra* note 45, at 7 (“Grotius appeals to [natural law] as the highest tribunal, because it spells out the principles of natural justice, principles which are not arbitrary because founded in nature.”).

47. GROTIUS, *THE RIGHTS OF WAR AND PEACE*, *supra* note 19, at 95 (“So that People which violate the Laws of Nature and Nations, break down the Bulwarks of their future Happiness and Tranquillity. But besides, though there were no Profit to be expected from the Observation of Right, yet it would be a Point of Wisdom, not of Folly, to obey the Impulse and Direction of our own Nature.”); see also Janis, *Sovereignty and International Law*, *supra* note 29, at 398.

48. GROTIUS, *THE RIGHTS OF WAR AND PEACE*, *supra* note 19, at 97 (“[T]here is no State so strong or well provided, but what may sometimes stand in need of Foreign Assistance, either in the Business of Commerce, or to repel the joint Forces of several Foreign Nations Confederate against it.”); *Id.* at 98 (“If there is no Community which can be preserved without some Sort of Right, as Aristotle proved by that remarkable Instance of Robbers, certainly the Society of Mankind, or of several Nations, cannot be without it”); see also Janis, *Sovereignty and International Law*, *supra* note 29, at 398.

49. Janis, *Sovereignty and International Law*, *supra* note 29, at 399.

50. The idea of a binding international law was more than welcome in the tempestuous early seventeenth century where the ideal of a world State which could assert universal jurisdiction was becoming highly unlikely considering the rise of nation-States. Murphy, *supra* note 35, at 479–80. Further increasing the need for a common legal order, during this period, relationships between European monarchs were becoming erratically unstructured due to the decline in power of the medieval Catholic Church and the result-

Grotius's system of the international law of war purporting to universality was very timely. It presented a practicable framework which could bind all the emerging modern States and regulate their conduct without impeding their exclusive sovereignty over their territories. With the bloodbath of the Thirty Years' War, such a framework was of the upmost importance.

In a salient part of *De jure belli ac pacis*, Grotius argued that, according to the law of nature, there were only three just causes of war: “[d]efense, the [r]ecovery of what’s our own, and [p]unishment.”⁵¹ These three reasons reflected the seventeenth century sovereigns’ most crucial preoccupations. As discussed in section VIII, Grotius was a man of peace and aimed to limit States’ right to make war to grave circumstances affecting their most vital interests.

In the next section, I show how Grotius treated property and sovereignty in the same manner. This is necessary to understand the connection between the interests at stake in Grotius’s second just cause of war—protection of property—and coastal States’ interests to maintain the current extent of their maritime territories through the preservation of established baselines despite the rising sea level.

IV. THE ESSENCE OF STATE TERRITORY: BETWEEN PROPERTY AND INTRINSIC ELEMENT OF STATEHOOD

As is shown below, Grotius essentially treated States’ territories as possessions. This conception of the nature of State territory is instructive to link territorial integrity to the just causes of war stated in *De jure belli ac pacis* and address the issue of how a State could “lose” a portion of its territory. Among the different theories that have been advanced over the years,⁵² it is of special interest for our purposes to address the dichotomy between the “object theory” (*Eigentumstheorie*) and the “subject theory” (*Eigenschaftstheorie*) of territory.

ing vanishing of the restraints the Church previously applied on States. Riley, *supra* note 38, at 12.

51. GROTIUS, *THE RIGHTS OF WAR AND PEACE*, *supra* note 19, at 395.

52. See MICHAEL JOHN STRAUSS, *TERRITORIAL LEASING IN DIPLOMACY AND INTERNATIONAL LAW* 30–34 (2015) (outlining several prominent theories that emerged in the nineteenth and early twentieth centuries attempting to explain the relationship between state and territory).

The object theory, influenced by Roman law principles, considers territory as being the property of the State in a manner that mirrors the legal relationship between individuals and their goods.⁵³ In other words, territory is understood as “what a state *has* rather than what a state *is*.”⁵⁴ This conception of territory implies that an international land ownership framework is superimposed upon the private land ownership system, and that the two are in essence similar.⁵⁵ The intersection between the concepts of *dominium* (i.e., the proprietary right on the territory “*in rem*”) and *imperium* (i.e., the State’s territorial authority as a sovereign and ruler)⁵⁶ is characteristic of the object theory. Such an intersection is clearly apparent in Grotius’s thought:⁵⁷

But now as Property, or Right to the Goods of an Enemy, may be acquired by a lawful War, the Word Lawful being taken in the Sense I before mentioned, so may also the Civil Dominion, or an absolute Right to command and govern the Enemy.

. . . .

53. E. N. van Kleffens, *Sovereignty in International Law*, in 82 RECUEIL DES COURS DE L’ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE 94 (1953); see also DISTEFANO, *supra* note 26, at 33-34 (“Les tenants de [la conception patrimonialiste de la souveraineté territoriale] . . . considèrent que le rapport entre l’État et son propre territoire soit en tous points *analogue* à celui entre l’individu et un bien.”); W. Schoenborn, *La Nature Juridique du Territoire*, in 30 RECUEIL DES COURS DE L’ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE 85, 100 (“Il n’est pas douteux un seul instant que la souveraineté territoriale a été conçue et interprétée à la façon d’un droit réel.”), 105 (1929) (“De nombreux auteurs parlent ici précisément d’une propriété de droit international exercée sur le territoire, propriété qui – par rapport à des États tiers – partage avec la propriété du droit privé, le caractère tout spécial de l’exclusivité et de la possibilité de libre disposition.”).

54. STRAUSS, *supra* note 52, at 31.

55. This superposition is apparent in *De jure belli ac pacis* where Grotius, quoting Seneca, states that “Kings . . . have Power over every Thing in their own Dominions; but yet every Man has his distinct Property.” GROTIUS, *THE RIGHTS OF WAR AND PEACE*, *supra* note 19, at 456-57.

56. Also referred to as “*ius excludendi alios*.” DISTEFANO, *supra* note 26, at 35.

57. DISTEFANO, *supra* note 26, at 34-35 (“Déjà chez Grotius on recense la coïncidence entre *dominium* et *imperium*.”); Schoenborn, *supra* note 53, at 102 (noting that “tant qu’il s’agit de la domination exercée sur le territoire de l’État, cette domination . . . est toujours interprétée comme ayant le caractère d’un droit réel” and quotes two paragraphs of *De jure belli ac pacis* to support this proposition); STUMPF, *supra* note 22, at 167.

Now as it is in other Things, so it is also in Sovereignty, it may be alienated by him who has a just Title to it; that is, as we shewed above, by a King, if the Crown be patrimonial; otherwise by the People, but not without the King's Consent; because he too has some Rights here, like to that of an Usufructuary, which Right he ought not to be deprived of contrary to his Will. And this regards the whole Extent of Sovereignty.⁵⁸

Despite this general equation between the concepts of property and sovereignty in Grotius's work, it should nonetheless be mentioned, for the sake of precision, that Grotius does not always handle both *dominium* and *imperium* at the same time when dealing with States' territorial rights.⁵⁹ He also sometimes refers to circumstances in which States may acquire jurisdiction over a territory, albeit without ownership—such as jurisdiction over the sea.⁶⁰ In that case, there would be only *imperium* without *dominium*, and therefore no proprietary rights over the territory in the strict sense.⁶¹ This is, however, only a caveat to Grotius's general adoption of the object theory.

The object theory, which was prevalent in the Christian tradition, remained unchallenged until the nineteenth century.⁶² While this theory is adequate to explain a State's relatively frequent territorial transactions, such as concessions, purchases and sales, servitudes, etc.,⁶³ the object theory fails to provide an accurate account of the essence of the complex State-territory relationship, which is hardly equivalent to mere ownership of the land.

58. GROTIUS, THE RIGHTS OF WAR AND PEACE, *supra* note 19, at 395, 568; see also Jean-Jacques Rousseau's criticism in JEAN-JACQUES ROUSSEAU, DU CONTRAT SOCIAL, Book I, ch. v, at 8 (MetaLibri, 2008) (1762) [hereinafter ROUSSEAU, DU CONTRAT SOCIAL].

59. See STUMPF, *supra* note 22, at 167.

60. GROTIUS, THE RIGHTS OF WAR AND PEACE, *supra* note 19, at 466–69.

61. See STUMPF, *supra* note 22, at 167.

62. Schoenborn, *supra* note 53, at 102 (“[I]l n'est fait, jusqu'au XIX^e siècle, aucune opposition sérieuse à cette interprétation juridique de principe.”); see also van Kleffens, *supra* note 53, at 94 (quoting Schoenborn with approbation).

63. DISTEFANO, *supra* note 26, at 35–36.

Finally, the object theory considers territory as something extrinsic to the State and does not take into account the necessity, under international law, for a State to “possess” a territory in order to exist. Carried to the extreme, the object theory would imply that a State could get rid of the entirety of its territory without ceasing to exist,⁶⁴ which is inherently problematic under the modern conception of statehood.

On the other hand, according to the subject theory, territory is a feature of the “state’s very being—‘the state personified’ ”⁶⁵ or, in other words, “the state itself in what is called its territorial aspect.”⁶⁶ This position is consistent with the widely accepted definition of “State” posited by Article 1 of the Montevideo Convention on the Rights and Duties of States.⁶⁷ Article 1 identifies a State’s “defined territory” as one of the four elements of statehood—along with a “permanent population,” a “government” and the “capacity to enter into relation with other states.”⁶⁸ As Professor Giovanni Distefano states, “the modern notion of the State (since, assuredly, the Peace of Westphalia) is inextricably linked to the notion of territory to the point where they become indistinguishable.”⁶⁹

This idea of territory as being an intrinsic element of statehood is absent in Grotius’s concept of international relations.⁷⁰ This is apparent where he discusses the continuity of the existence and identity of the “perfect community”⁷¹ despite the loss of its territory and migration of people to another place.⁷² This makes the author Christoph A. Stumpf suspect that Grotius would probably accept the existence of a

64. KRYSZYNA MAREK, *IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW* 18–20 (2d ed. 1968); STRAUSS, *supra* note 52, at 31.

65. STRAUSS, *supra* note 52, at 30 (translating and quoting CHARLES ROUSSEAU, *COURS DE DROIT INTERNATIONAL PUBLIC* 17 (1956)).

66. Van Kleffens, *supra* note 53, at 95.

67. Convention on Rights and Duties of States art. 1, Dec. 26, 1933, 165 L.N.T.S. 19.

68. *Id.*

69. DISTEFANO, *supra* note 26, at 26 (“[L]a notion moderne d’État (depuis, assurément, la Paix de Westphalie) s’est inextricablement liée à la notion du territoire jusqu’à s’y confondre.”) (author’s translation).

70. STUMPF, *supra* note 22, at 184.

71. *Id.* at 183–84.

72. GROTIUS, *THE RIGHTS OF WAR AND PEACE*, *supra* note 19, at 671 (“But if the People shall only leave the Place, either of their own Accord, through Famine, or any other Misfortune, or by Compulsion, as the *Carthaginians*, in

State established by nomads without a territory of its own, even though he would consider that an exceptional case.⁷³

Today, the subject theory attracts much criticism because it is ill-fitted to explain a number of phenomena such as the territorial transactions mentioned above (concessions, purchases, servitudes, etc.), the sharing of competence between more than one State, or the extension of State powers to its citizens abroad.⁷⁴ However, the most fundamental conceptual problem of the subject theory is that it implies that every modification to the territory would affect the international personality of the State.⁷⁵ As the diplomat E. N. van Kleffens exclaimed, "After all, a state cannot be imagined as divesting itself of particles of its identity!"⁷⁶

Beyond these two "classical" theories (the "object theory" and the "subject theory"), the present analysis would not be complete without briefly mentioning the "competence theory," or "jurisdictional theory" (*Kompetenztheorie*), which has more recently been elaborated upon to address the shortcomings of the subject theory. Under the competence theory, territory is only one of the manifestations of the State (i.e., its jurisdiction *rationae loci*).⁷⁷ Consequently, the State-territory relationship is one of spatial legal authority.⁷⁸ Adopted notably by the philosopher Hans Kelsen, this theory conceptualizes territory as "the territorial sphere of validity of the legal order

the *Punick War*; if the Form, I mentioned, continue, they do not cease to be a People, much less if only the Walls of the City be thrown down.").

73. STUMPF, *supra* note 22, at 184.

74. DISTEFANO, *supra* note 26, at 37 ("[C]ette théorie ne pas à expliquer certains phénomènes courants dans la vie internationale, tels que la concession en administration, en bail, etc."); 2 CHARLES ROUSSEAU, *DRIT INTERNATIONAL PUBLIC* 47–48 (1974); STRAUSS *supra* note 52, at 30.

75. DISTEFANO, *supra* note 26, at 37 ("Le plus grave inconvénient auquel se heurte cette théorie découle du fait que toute modification de l'assiette territoriale de l'État devrait comporter des modifications au regard de l'essence même de l'État."); Schoenborn, *supra* note 53, 116 ("L'État perdrait, au fond, son identité par suite de tout changement du territoire."); van Kleffens, *supra* note 53, at 96 ("If the territory of a state is of its essence, any modification of that territory would result in that state losing its identity.").

76. Van Kleffens, *supra* note 53, at 96.

77. DISTEFANO, *supra* note 26, at 38.

78. STRAUSS, *supra* note 52, at 32.

called State”⁷⁹ and it is now the prevalently accepted theory concerning the nature of State territory.⁸⁰

Given the relatively recent development of the subject and competence theories, it is unremarkable, from an historical perspective, that a seventeenth century author such as Grotius adopted the object theory without serious reassessment.⁸¹ However, Grotius’s conceptualization of territory as being a State’s possession—and the assimilation he makes between the concepts of sovereignty and property—is cardinal for purposes of this Note. Indeed, because of his adoption of the object theory, a State’s territorial gains or losses should be analyzed in light of Grotius’ regime of proprietary rights.

V. GROTIUS’S REGIME OF PROPERTY RIGHTS AND ACQUISITION OF SOVEREIGNTY

As described in the previous section, Grotius conceptualized a State’s territory as being the property of that State: “[f]or nowadays sovereignty means a particular kind of proprietorship, such in fact that it absolutely excludes like possession by any one else.”⁸² Yet, as we shall see, Grotius thought that possession played a central role in the creation of property rights. This is particularly interesting for the justification of sovereignty.

As a true man of his time, Grotius extensively discusses property rights which were, perhaps in response to the Reformation theology,⁸³ a topic of predilection for intellectuals in the seventeenth century. He understood the primitive world as

79. HANS Kelsen, *GENERAL THEORY OF LAW AND STATE* 208 (Anders Wedberg trans., 2009) (1945). It is interesting to note, as pointed out by van Kleffens, that “Kelsen does not seem to have freed himself entirely of all vestiges of the proprietary theory, for he speaks . . . of ‘the state to which the territory belongs.’” van Kleffens, *supra* note 53, at 96 n.4 (citation omitted); see also HANS Kelsen, *PRINCIPLES OF INTERNATIONAL LAW* 213 (1952).

80. STRAUSS, *supra* note 52, at 32.

81. Under the subject theory, a loss of territory to which a State does not agree could arguably be akin to an act of aggression towards the personality State. Such a threat would go to the State’s vital interest in self-preservation, which is also a cause of just war according to Grotius. GROTIUS, *THE RIGHTS OF WAR AND PEACE*, *supra* note 19, at 395. However, this Note focusses on the object theory since it is the one adopted by Grotius. The analysis under the subject theory is therefore beyond the scope of this Note.

82. GROTIUS, *THE FREEDOM OF THE SEAS*, *supra* note 13, at 22.

83. LALONDE, *supra* note 36, at 17.

one where all humans had equal joint rights to the earth's resources.⁸⁴ As the universe was originally given by God to all men—first, immediately after the Creation, and second, after the Deluge⁸⁵—there was no private property in the Grotian primitive law of nations.⁸⁶ Everything was originally held in common by all, including land and sea territories.⁸⁷ In this Hobbesian-like state of nature,⁸⁸ men could take from the commons what they needed to meet their needs.⁸⁹ Things then belonged to those in possession of them, but it was not possible to exclude others before or after possession.⁹⁰ Because of this initial state, Grotius believed that the introduc-

84. John Salter, *Hugo Grotius: Property and Consent*, 29 *POL. THEORY* 537, 537 (2001).

85. GROTIUS, *THE RIGHTS OF WAR AND PEACE*, *supra* note 19, at 420 (“Almighty GOD at the Creation, and again after the Deluge, gave to Mankind in general a Dominion over Things of this inferior World.”).

86. GROTIUS, *THE FREEDOM OF THE SEAS*, *supra* note 13, at 23 (“In the primitive law of nations, which is sometimes called Natural Law, and which the poets sometimes portray as having existed in a Golden Age, and sometimes in the reign of Saturn or of Justice, there was not particular right. As Cicero says: ‘But nothing is by nature private property.’ . . . For nature knows no sovereigns. Therefore in this sense we say that in those ancient times all things were held in common. . . .”); *see also* Marcelo de Araujo, *Hugo Grotius, Contractualism, and the Concept of Private Property: An Institutional Interpretation*, 26 *HIST. OF PHIL. Q.* 353, 353 (2009); Salter, *supra* note 84, at 539.

87. GROTIUS, *THE FREEDOM OF THE SEAS*, *supra* note 13, at 24 (“For God had not given all things to this individual or to that, but to the entire human race, and thus a number of persons, as it were *en masse*, were not debarred from being substantially sovereigns or owners of the same thing, which is quite contradictory to our modern meaning of sovereignty.”).

88. This comparison is valid with respect to the absence of property rights only. Indeed, it has been argued by Benjamin Straumann that Grotius’s conception of the state of nature is quite different from Hobbes’ because “Grotius’ state of nature is essentially a legal condition, where the norms of natural law are enforced by the holders of subjective natural claim-rights.” Benjamin Straumann, “Ancient Caesarian Lawyers” in *A State of Nature: Roman Tradition and Natural Rights in Hugo Grotius’s De Iure Praedae*, 34 *POL. THEORY* 328, 329 (2009).

89. GROTIUS, *THE RIGHTS OF WAR AND PEACE*, *supra* note 19, at 420–21 (“Use of the Right common to all Men did at that Time supply the Place of Property, for no Man could justly take from another, what he had thus first taken for himself.”); *see also* STUMPF, *supra* note 22, at 170 (“Initially, all things were held as common property, from which anyone could take what was required for maintaining oneself.”).

90. GROTIUS, *THE FREEDOM OF THE SEAS*, *supra* note 13, at 24.

tion of ownership required a “universal agreement to dissolve the original rights.”⁹¹

Compelled by reason, because “a certain kind of ownership is inseparable from use,”⁹² a gradual transition from the state of nature (where men could only possess things) to the modern world (where ownership is possible) began.⁹³ According to Grotius, this process started with the things that, once used, are no longer fit for future use by others (such as water and food), continued with clothes and some living things, and finished with “immovables” (such as fields).⁹⁴ Although it is not made explicit in Grotius’s work, it is a reasonable inference that the introduction of sovereignty would have occurred at the same time as the creation of private ownership of land. Indeed, in the Grotian framework, the same body of rules generally applies to private property and to a State’s sovereign title on its territory.⁹⁵

Borrowing from classical Roman property law, Grotius held that once the private property regime had been put in place in the modern world, there were two ways to legitimately acquire property: first, by original acquisition when there was no previous proprietary right on a given thing, and second, by way of a transfer of pre-existing rights from the previous right holder.⁹⁶ Despite Grotius’s belief that ownership was an invention of human law, he considered that men then had a right

91. Salter, *supra* note 84, at 537; see also GROTIUS, *THE RIGHTS OF WAR AND PEACE*, *supra* note 19, at 426; STUMPF, *supra* note 22, at 171 (“The original introduction of single property rights and their allocation to individuals had taken place under what Grotius regards to be a tacit agreement.”); Araujo, *supra* note 86, at 363.

92. GROTIUS, *THE FREEDOM OF THE SEAS*, *supra* note 13, at 24; BUCKLE, *supra* note 45, at 9–10.

93. Nevertheless, Grotius did not consider that the creation of ownership was ineluctable. For example, he referred to the native people of America who chose not to have private property because of their way of living. STUMPF, *supra* note 22, at 172.

94. GROTIUS, *THE FREEDOM OF THE SEAS*, *supra* note 13, at 25 (“When property or ownership was invented, the law of property was established to imitate nature. For as the use began in connection with bodily needs, from which as we have said property first arose, so by a similar connection it was decided that things were the property of individuals.”); Salter, *supra* note 84, at 544.

95. STUMPF, *supra* note 22, at 171.

96. GROTIUS, *THE RIGHTS OF WAR AND PEACE*, *supra* note 19, at 454 (“The particular Right we have to a Thing, is either by original or derivative Acqui-

guaranteed by the law of nature not to be unduly disturbed in their peaceful ownership,⁹⁷ “[f]or the Design of Society is, that every one should quietly enjoy his own.”⁹⁸ According to Grotius, property is of central importance for society because it is “the first and most essential element of justice.”⁹⁹ Therefore, the protection by natural law of the social phenomenon that is property is coherent with Grotius’s proposition that man’s innate sociability and desire to live in society was the source of natural law. Indeed, property—as the legal expression of rightful possession—is crucial to the maintenance of orderly social relations within a society of men.

Possession, or the effective exercise in fact of proprietary rights, is central to Grotius’s property scheme. Indeed, rights stemming from acts of possession predated ownership. Possession also remained thereafter the primary means of acquiring property in connection with the appropriation of territories.¹⁰⁰ Grotius treated maritime territories differently than land because he believed that the sea—except perhaps for a very limited belt adjacent to the coast¹⁰¹—was not susceptible to possession, which is an essential feature of State territorial title. For this reason, he believed that seas were excluded from the original tacit agreement among mankind to divide territories into parts subject to proprietary rights.¹⁰²

From a modern point of view, it is hardly arguable that the sea is not subject to possession by States given the development of marine technology.¹⁰³ Furthermore, it is undisputable that there has been a “universal agreement”—similar to the original one imagined by Grotius as the creative source of ownership—to grant coastal States a certain maritime territory. This “universal agreement” occurred first as a result of States’ practice under international customary law, and then through the overwhelming States’ adherence to international

sition.”); see also DISTEFANO, *supra* note 26, at 95; STUMPF, *supra* note 22, at 176.

97. See Salter, *supra* note 84, at 537; see also RICHARD SCHLATTER, PRIVATE PROPERTY: THE HISTORY OF AN IDEA 130 (1951).

98. GROTIUS, THE RIGHTS OF WAR AND PEACE, *supra* note 19, at 184.

99. BUCKLE, *supra* note 45, at 2-3.

100. STUMPF, *supra* note 22, at 178.

101. See *supra* Section II.

102. STUMPF, *supra* note 22, at 179.

103. *Id.* at 180.

conventions on the law of the sea.¹⁰⁴ Abiding by the rules agreed to in this context, coastal States have drawn baselines complying with the convention requirements and have accordingly asserted their sovereignty, through acts of the public authority, over a specific maritime territory calculated from those baselines for a significant period of time. They thereby possessed those parts of the sea, as possession is understood in the context of maritime territories.

The importance of possession in Grotius's property framework reflects his conception that proprietary rights are not ends in themselves, but rather fulfill a certain purpose.¹⁰⁵ They crystallize, in legal terms, the factual situation of possession and hence provide a stability that is necessary for the orderly functioning of society. In this respect, "Grotius acknowledges the positive effects of the introduction of proprietary rights as an order which at least in principle is designed to ensure peace within society in relation to the use of assets."¹⁰⁶ The preservation of the current maritime territories fits squarely within this objective. As discussed in greater detail in section VI, fixed baselines would avoid the legal uncertainty that is inherent to ever-changing baselines.¹⁰⁷

Coastal States have properly obtained "ownership," according to Grotius's property framework, of the maritime territories at stake by being granted title following an "universal agreement" to this effect. States consequently acquired the

104. Namely UNCLOS and its predecessor, the Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 516 U.N.T.S. 205.

105. STUMPF, *supra* note 22, at 175.

106. *Id.* at 173.

107. Again, because of the emphasis he put on effective possession, Grotius probably would subscribe, as argued by Christoph A. Stumpf, to the idea expressed by the philosopher John Rawls that property ensures that owners take personal responsibility for preventing assets from deteriorating. This is especially interesting in the context of maritime territories because one of the justifications for sovereign title over parts of the sea, along with the protection of States' interests, is to limit the detrimental effects of the so-called "tragedy of the commons" whereby shared-resources are susceptible to be quickly depleted as a result of the unconstrained use of self-interested users. Jurisdiction over coastal waters was *inter alia* meant to provide coastal States with means to ensure minimal protection for the marine environment and resources adjoining their shorelines. Whether this attempt was a success is, however, a debate for another day. See JOHN RAWLS, *THE LAW OF PEOPLES WITH "THE IDEA OF PUBLIC REASON REVISITED"* 8, 39 (1999); STUMPF, *supra* note 22, at 173.

right to “quietly enjoy [their] own” as long as their proprietary rights have not been extinguished, which is the subject of the next section.

VI. TERMINATION OF PROPRIETARY RIGHTS AND LOSS OF SOVEREIGN TITLE

Grotius asserted that there are two ways to extinguish a proprietary right: (1) the termination of the right holder where he leaves no successor and (2) the abandonment of the right in question.¹⁰⁸ To avoid any confusion, it must be specified that those possibilities are the ones that would *terminate* the right. In the Grotian property framework, it is also possible for the right holder to cease to have ownership because of a voluntary transfer of his right, a transfer mandated by law, or as a result of acts performed in the course of a just war.¹⁰⁹ After the extinction of property rights, Grotius stated that the things in question go back to their previous stage. This previous stage is being the common property of everyone (*res communes*), rather than being owned by no one (*res nullius*).¹¹⁰

If we aim to apply the Grotian framework for the termination of property rights to the potential territorial loss of coastal States resulting from the rising sea level, we have to perform the difficult task of making this situation fit into one of the aforementioned categories that leads to the extinguishment of proprietary rights. Indeed, generally, sea level rise would lead to the termination rather than to the transfer of the State’s right.¹¹¹ The sovereign title on the maritime territory no longer justified under UNCLOS by the current position of the shorelines would be dissolved. For its part, the maritime territory in question would be attached to the high seas, which cor-

108. GROTIUS, *THE RIGHTS OF WAR AND PEACE*, *supra* note 19, at 664; *see* STUMPF, *supra* note 22, at 183.

109. GROTIUS, *THE RIGHTS OF WAR AND PEACE*, *supra* note 19, at 566; *see* STUMPF, *supra* note 22, at 181.

110. GROTIUS, *THE RIGHTS OF WAR AND PEACE*, *supra* note 19, at 479 (“Nor is it undeserving our Observation, that the Acquisition of such Things as have had an Owner once, but are now without one, either because they are abandoned, or because the Owners themselves are dead and gone, is to be judged an original Acquisition: For in such a Case they return to the State in which all Things were at first.”); STUMPF, *supra* note 22, at 186.

111. For the exceptions where there would be a transfer of title, *see supra* note 14.

responds to Grotius's concept of common property and is the fate of extinguished property rights.

I now examine the two cases where there is termination of property rights. The first option is the termination of the right holder. With the notable exception of the few small low-lying island States that are at risk of disappearance because of the rising sea level,¹¹² the vast majority of affected coastal States would not be "terminated." We are then left with the second option: abandonment of title. Termination of property right because of abandonment is summarily explained by Grotius in the following terms: "[w]here there is no Will, there is no Property."¹¹³ One could argue that the coastal States, having presumptively accepted to be bound by the UNCLOS, have thereby agreed in advance to renounce their sovereignty over the parts of their maritime territory that would no longer be justified in the event that their land territory flooded. For the sake of argument, it is also possible to consider that this situation constitutes, by analogy, a transfer of ownership mandated by law to the international community as a whole.

However, these two fictions are unsatisfactory theoretical explanations for the systematized territorial loss that would occur if the moving baselines thesis were to prevail. They poorly reflect the reality given that the text of UNCLOS is far from being clear as to the intended fate of established baselines given the sea level rise. In this context, the fictitious prearranged acceptance to abandon or to transfer title referred to in the previous paragraph only offers a shaky basis for the termination of the right. It would be unprecedented, to my knowledge, to expect States to relinquish parts of their territories based on the previous acceptance of a legal instrument at a time when the territorial loss was not—and, in all likelihood, could not have been—materially anticipated given the state of understanding of climate change when UNCLOS was negotiated.

112. Namely the Republic of Maldives, Tuvalu, Marshall Islands, Nauru and Kiribati. Étienne Piguet, *Des Apatrides du Climat?*, 683 ANNALES DE GÉOGRAPHIE 86, 92 (2012). On this subject, see, for example, Jonathan Luthaus, *Shifting Sands: Sea Level Rise, Maritime Boundaries and Inter-state Conflict*, 30 POLITICS 113 (2010); Jane McAdam, *'Disappearing States', Statelessness and the Boundaries of International Law*, 2 U. N.S.W. L. RES. PAPER 1 (2010); Rayfuse, *supra* note 5.

113. GROTIUS, *THE RIGHTS OF WAR AND PEACE*, *supra* note 19, at 664.

In modern international law, the issue of termination of sovereign title and the related concern regarding territorial stability are reflected in Article 62(2)(a) of the Vienna Convention on the Law of Treaties. This article provides that a fundamental change of circumstances cannot be invoked by States as a ground for terminating or withdrawing from a treaty establishing a boundary.¹¹⁴ This article highlights the importance that the international community places on the stability of boundaries. This is easily understood since territorial matters have proven through history to be extremely sensitive among States.¹¹⁵ As Professor Kaiyan H. Kaikobad explains, there is a “rule of law which, in general terms, is to the effect that a boundary established in accordance with law attains a compelling degree of continuity and finality.”¹¹⁶

For instance, in the Legal Status of Greenland Case,¹¹⁷ the Permanent Court of International Justice reiterated the international policy of territorial stability. This case, among the numerous decisions in which international tribunals stressed the importance of territorial stability,¹¹⁸ is of particular interest for present purposes because it featured a peculiar territorial dispute where no country other than Denmark claimed sovereignty over the land in question. The question was then whether Greenland was a Danish territory or considered *terra nullius*. The Court concluded that Greenland belonged to

114. Vienna Convention on the Law of Treaties, art. 62 (2)(a), May 23, 1969, 1155 U.N.T.S. 331.

115. DISTEFANO, *supra* note 26, at 9 (“[L]e territoire demeure au centre des préoccupations des États”); Kaiyan Homi Kaikobad, *Some Observations on the Doctrine of Continuity and Finality of Boundaries*, 54 BRIT. Y.B. INT’L L. 119, 119 (1983); LALONDE, *supra* note 36, at 138–39 (“One of the most fundamental concerns for a state is the maintenance of a maximum degree of territorial stability.”); Soons, *supra* note 2, at 228.

116. Kaikobad, *supra* note 115, at 119.

117. Legal Status of Greenland (Den. v. Nor.), Judgment, 1933 P.C.I.J. (ser. A/B) No. 53 (Apr. 5).

118. See, e.g., Continental Shelf (Tunis. v. Libya), Judgment, 1982 I.C.J. Rep. 18, at 65–66 (Feb. 24); Temple of Preah Vihear (Cambodia v. Thai.), Judgment, 1962 I.C.J. Rep. 6, at 34 (June 15) (“In general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality.”); Grisbådarna (Nor. v. Swed.), Hague Ct. Rep. (Scott) 122 (Perm. Ct. Arb. 1909) (making the broad statement that “it is a settled principle of the law of nations that a state of things which actually exists and has existed for a long time should be changed as little as possible”).

Denmark because that country “maintained territorial stability over the disputed territory for a considerable period of time.”¹¹⁹ Commenting on the decision, the eminent jurist Hersch Lauterpacht opined that a determination of *terra nullius* “would have been contrary to those principles of finality, stability and effectiveness . . . which have characterised the work of the Court.”¹²⁰

Coming back to the practical effect of Article 62(2)(a) of the Vienna Convention on the Law of Treaties, a boundary delimiting the maritime territories of two States that has been fixed in a treaty will not be affected by the rising sea level. According to Article 62(2)(a), it is not possible for States to claim that the sea level rise constitutes a fundamental change of circumstance allowing termination of the treaty fixing the boundary.¹²¹ In this light, it seems even more reasonable to adopt the fixed baselines thesis as it would lead to uniformity of results for maritime boundaries that have been fixed by treaties and those that have not. Also, it would likely ease the relationships between adjoining coastal States by limiting their ability to strategically conclude—or not—boundary treaties with their neighboring States in order to secure a more favorable result for themselves. Furthermore, the adoption of the fixed baselines thesis would reflect the same sound international policy to promote territorial stability as the one found in Article 62(2)(a).¹²²

Interpreting the inconclusive UNCLOS provisions as including an implicit renunciation or transfer by coastal States of territories over which they had previously established their sovereignty entails a departure from the strong bias in favor of the finality of the fixation of international boundaries. It also

119. Legal Status of Greenland, *supra* note 117, at 46–54; LALONDE, *supra* note 36, at 139.

120. HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 241 (1958); *see* LALONDE, *supra* note 36, at 139. It is however noteworthy that a major difference between our baseline issue and the Greenland Case is that the latter concerned land territory rather than maritime territory. While land *terra nullius* is somewhat problematic because of the jurisdictional vacuum it entails, maritime “*terra nullius*” (i.e., high seas) does not in itself cause any difficulty.

121. Vienna Convention on the Law of Treaties, *supra* note 114, art. 62(2)(a).

122. For a more in-depth discussion of this argument, *see* Blanchette-Séguin, *supra* note 8, at 13–15.

arguably hurts the reasonable expectations of the States parties to this Convention.

VII. A PRAGMATIC APPROACH: THE LAW OF NATIONS AND STATES' EXPECTATIONS

In addition to being in line with the law of nature, the fixed baselines thesis would preserve States' expectations as well. The respect of such expectations was crucial for Grotius.

Grotius's work is also important in international law because it attempted to elaborate a legal system governing relationships between States that would be both feasible and ethical. In so doing, Grotius distanced himself both from a counterproductive idealism and an unacceptable realism.¹²³ Indeed, "Grotius wanted to steer a narrow and difficult path between Utopian idealism which had no chance of exercising any influence on the actual behaviour of States, and Machiavellian realism which would have amounted to total surrender to their will and whim."¹²⁴ This balanced approach is apparent particularly in Grotius's middle-ground position on the legitimacy of the warfare then prevalent in Europe. He refused to align either with the purists who believed that any use of arms was incompatible with a Christian conscience, or with those at the other end of the spectrum who thought that all wars made by sovereigns were lawful.¹²⁵

In an important manifestation of his pragmatism, Grotius accepted that there was—in addition to the law of nature and the divine law—a law that had for its source human volition. The latter could supplement—but not flatly contradict—the first two sources. He called this law that emanates from human consent the "law of nations" or "positive law of nations."¹²⁶ By creating a system that combines the authority of the law of na-

123. See Steven Forde, *Hugo Grotius on Ethics and War*, 92 AM. POL. SCI. REV. 639, 639 (1998).

124. Abi-Saab, *supra* note 34, at 81.

125. Murphy, *supra* note 35, at 480.

126. GROTIUS, *THE FREEDOM OF THE SEAS*, *supra* note 13, at 53; see BUCKLE, *supra* note 45, at 10 ("[I]f positive laws are not to be contrary to nature, they can allow of a measure of variation, if not of boundless diversity."); SUGANAMI, *supra* note 43, at 223 ("The law emanating from human nature, however, is not alone in regulating human relationships since expediency too produces legal principles. Internationally, the consideration of expediency has established a body of law based on consent.").

ture with the flexibility of the law of nations,¹²⁷ Grotius desired to establish “an *effective* set of moral restraints on states.”¹²⁸ Furthermore, this consensual aspect of international law based on States’ contracts and covenants helped to reconcile the notions of sovereignty and of an international law binding upon States.¹²⁹

This positive law of nations is based on the mutual consent of States—whether expressed in a treaty or implied by custom¹³⁰—“acting in the context of a ‘great society of States.’”¹³¹ In this regard, Grotius’s philosophy of international law emphasized, to some extent, what “is” (i.e., actual treaties and customs) rather than what “ought to be” (i.e., moral ideals). This view elicited scorn from Jean-Jacques Rousseau who believed that Grotius favored tyrants since “[h]is constant way of reasoning is to establish law by reference to the facts.”¹³² Similarly, the historian of political philosophy Charles E. Vaughan contended that *De jure belli ac pacis* was a “learned medley” vitiated by its “perpetual confusion between fact and Right.”¹³³

It follows from Grotius’s acceptance of human consent as a source of law that he attached great importance to the observance of States’ undertakings. Indeed, he thought that the fulfillment of commitments, promises, and contracts was so important that their binding force comes from the law of nature.¹³⁴ In Grotius’s conception, it is key that States abide by

127. GROTIUS, *THE FREEDOM OF THE SEAS*, *supra* note 13, at 53 (“For, since the law of nature arises out of Divine Providence, it is immutable; but a part of this natural law is the primary or primitive law of nations, differing from the secondary or positive law of nations, which is mutable.”).

128. Forde, *supra* note 123, at 639.

129. Janis, *Sovereignty and International Law*, *supra* note 29, at 399.

130. Lauterpacht, *The Grotian Tradition*, *supra* note 36, at 43; Hendrik van Eikema Hommes, *Grotius on Natural and International Law*, 30 *NETH. INT’L L. REV.* 61, 62 (1983).

131. Janis, *Sovereignty and International Law*, *supra* note 29, at 396.

132. Lauterpacht, *The Grotian Tradition*, *supra* note 36, at 1 n.3 (translating ROUSSEAU, *DU CONTRAT SOCIAL* *supra* note 58, at Book 1, ch. II) (“Sa plus constante manière de raisonner est d’établir le droit par les faits.”).

133. 1 CHARLES E. VAUGHAN, *STUDIES IN THE HISTORY OF POLITICAL PHILOSOPHY* 22 (1925).

134. See GROTIUS, *THE RIGHTS OF WAR AND PEACE*, *supra* note 19, at 79–81; Janis, *Sovereignty and International Law*, *supra* note 29, at 397; Kingsbury & Roberts, *supra* note 31, at 30.

the engagements they undertook in order to maintain a viable and durable community of States, as this is the only way to ensure mutual trust, protect other States' expectations, and pave the way for further peaceful relationships. This concept is now enshrined in Article 26 of the Vienna Convention on the Law of Treaties which states, "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."¹³⁵ Known under its Latin name *pacta sunt servanda*, this rule is considered to be a fundamental principle of international law.¹³⁶

To apply the principle of *pacta sunt servanda* to the fixed or moving character of maritime baselines, it must first be mentioned that it is an understatement to say that there is no consensus in the international community on the rule mandated by UNCLOS regarding baselines in light of the sea level rise.¹³⁷ Therefore, it is extremely difficult to ascertain the obligation that the States that are parties to UNCLOS have undertaken by adhering to this Convention and that they must perform in good faith. In this context of great uncertainty, it is my opinion that the fundamental purposes of the principle *pacta sunt servanda* would be better served by preserving the currently established baselines for the reason that follows.

As the significant regression of coastlines generally was not anticipated, the States realistically expected to fix boundaries of a permanent nature through UNCLOS. Indeed, where it was readily foreseeable that the shoreline would be unstable (because of the presence of a delta or other natural conditions), States provided for a mechanism to fix a durable baseline.¹³⁸ In this light, considering the unprecedented character of the massive territorial loss resulting from receding coastlines, the parties' expectations would not be hurt if the current baselines remained effective. However, the reverse proposition

135. Vienna Convention on the Law of Treaties, *supra* note 114, art. 26.

136. See, e.g., Lauterpacht, *The Grotian Tradition*, *supra* note 36, at 17.

137. In addition, the working hypothesis for this note is that UNCLOS provisions are inconclusive. See *supra* Section I.

138. UNCLOS, *supra* note 3, art. 7 § 2. To be fair, I must mention that proponents of the moving baselines thesis would conversely argue that when States intended to fix a limit in a definitive fashion, they explicitly said so, such as for the limits of the continental shelf. See *id.* art. 7 § 9. For a more in-depth discussion of this argument and counterargument, see Blanchette-Séguin, *supra* note 8, at 4–6.

appears far more doubtful. Moreover, the goals of maintaining a peaceful order within the society of States and not disrupting the equality among them would be better achieved if the current baselines were to be preserved. These two subjects are discussed in turn in the following two sections.

VIII. GROTIUS'S CALL FOR PEACE AND ORDER

Despite the fact that Grotius elaborated a theory of just war, some scholars consider him to be a pacifist.¹³⁹ In this respect, Hersh Lauterpacht asserted that “[i]n general, there breathes from the pages of *De Jure Belli ac Pacis* a disapproval, amounting to hatred, of war.”¹⁴⁰ Yet, at the other side of the spectrum, Professor Richard Tuck expressed the exact opposite opinion: “*De Jure Belli ac Pacis* reminded [Grotius’s] audience that he was still an enthusiast for war around the globe.”¹⁴¹ This section takes the position that Grotius was a pacifist but also a realist and shows how Grotius’s call for peace and order supports the fixed baseline thesis.

In order to properly understand *De jure belli ac pacis*, it is crucial to consider its historical context, notably that it was published in the midst of the slaughter of the Thirty Years’ War. The purpose of *De jure belli ac pacis* was to limit war to the strict minimum, in terms of both the circumstances in which war can justly be made and of the acts of war that are permissible.¹⁴² While Grotius believed that war was a natural feature of human society,¹⁴³ he aimed to establish that warfare is also subjected to a form of law and that “justice would not be silenced by the clash of arms.”¹⁴⁴ Another manifestation of his pacifism is that Grotius was an early proponent of alternative

139. Alfred Dufour, *Grotius—Homme de Loi, Homme de Foi, Homme de Lettres*, in GROTIIUS ET L’ORDRE JURIDIQUE INTERNATIONAL, *supra* note 34, at 9, 25; Lauterpacht, *The Grotian Tradition*, *supra* note 36, at 46; LARRY MAY, AGGRESSION AND CRIMES AGAINST PEACE 25 (2008).

140. Lauterpacht, *The Grotian Tradition*, *supra* note 36, at 47.

141. RICHARD TUCK, THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT 95 (1999).

142. GROTIUS, THE RIGHTS OF WAR AND PEACE, *supra* note 19, at 101 (“No War ought to be so much as undertaken but for the obtaining of Right; nor when undertaken, ought it to be carried on beyond the Bounds of Justice and Fidelity.”).

143. Janis, *Sovereignty and International Law*, *supra* note 29, at 398.

144. Murphy, *supra* note 35, at 480.

dispute resolution. Thus, he recommended that States do not rush into war, but rather take steps to settle their conflicts in other ways, such as engaging in negotiation¹⁴⁵ and arbitration.¹⁴⁶ All in all, quoting St. Augustine, Grotius calls for peace: “We seek not peace, to make War; but we make war, in order to establish peace.”¹⁴⁷

Perhaps even more importantly than his pacifist discourse, Grotius suggested a tangible, “workable theory of law and order for inter-state relations.”¹⁴⁸ In a world torn apart by religious conflicts, Grotius contrived a natural law that was based, not on a divine command, but rather on human nature so it could pretend to universality. In this respect, he “offered the prospect of peace despite continuing religious differences.”¹⁴⁹

Grotius’s pacifist position stems directly from his understanding of human nature. In his view, men have the impelling desire to live in society “not in any [m]anner whatever, but peaceably.”¹⁵⁰ In other words, to live a life “organised according to the measure of [their] intelligence, with those of who are of [their] own kind.”¹⁵¹

Because he viewed it as necessary to make life in society possible, Grotius grants a significant importance to order. Gro-

145. GROTIUS, *THE RIGHTS OF WAR AND PEACE*, *supra* note 19, at 1121 (“There being two Sorts of disputing in the World, says Cicero, the one by Reason, the other by Force, that agreeable to the Nature of Man, and this to Brutes, we ought never to have recourse to the latter, but when we cannot redress our Grievances by the former.”); *see also* Lauterpacht, *The Grotian Tradition*, *supra* note 36, at 47; O’CONNELL, *supra* note 34, at 12.

146. GROTIUS, *THE RIGHTS OF WAR AND PEACE*, *supra* note 19, at 1123–24 (“The second way to prevent War between those, who, not belonging to the same Jurisdiction, have no common Judge to appeal to, is to put the Matter to Arbitration: . . . It is barbarous and abominable to fall upon him as an Enemy, who is willing to put his Case to Reference.”).

147. GROTIUS, *THE RIGHTS OF WAR AND PEACE*, *supra* note 19, at 1639–40.

148. Janis, *Sovereignty and International Law*, *supra* note 29, at 394.

149. BUCKLE, *supra* note 45, at 23.

150. GROTIUS, *THE RIGHTS OF WAR AND PEACE*, *supra* note 19, at 81.

151. HUGO GROTIUS ON THE LAW OF WAR AND PEACE STUDENT EDITION prologue (Stephen C. Neff ed., Stephen C. Neff, trans. 2012) (1625) (ebook). Interestingly, in addition to being the source of the law of nature, men’s sociability is held to be one of the main features that set mankind apart from animals. *See* GROTIUS, *THE RIGHTS OF WAR AND PEACE*, *supra* note 19, at 79.

tius even states that order is simply liked by God.¹⁵² This predilection for order is evidenced by Grotius's basic requirements for an organized social life,¹⁵³ including the fulfilment of promises and respect of others' property.¹⁵⁴ Furthermore, the project underlying his treatise, *De jure belli ac pacis*, was to "bring order out of the chaos of international conflict"¹⁵⁵ and restore the organized life in society. Summarizing Grotius's overall contribution to international law, Professor Alfred Dufour expressed the view that Grotius was "the foremost example of a man dedicated to order."¹⁵⁶

Considering the foregoing, it appears that the fixed baselines thesis is the most in line with Grotius's ideals of peace and order. First, the fixed baselines thesis entails stability of "ownership" of maritime territories which is consistent with the importance Grotius gives to stability of property rights. Fixed baselines also ensure certainty of navigation and property rights over the natural resources located in those territories. Conversely, moving baselines would defeat a boundary's primary goal—to establish with precision the limits of a State's jurisdiction. This is especially true as the rising sea level is a continuing and variable phenomenon that will perpetually affect the position of the low-water line and corresponding baseline,¹⁵⁷ making it highly difficult—if not impossible—for States, fishermen, and sailors to determine exactly whether a boat is in territorial waters or on the high seas.¹⁵⁸ For this rea-

152. Dufour, *supra* note 139, at 32 (citing a June 16, 1614, letter from Grotius published in 1 BRIEFWISSELING VAN HUGO GROTIUS 321 (P. C. Molhuysen ed., 1928)).

153. Namely, "abstaining from that which is another's, and the Restitution of what we have of another's, or of the Profit we have made by it, the Obligation to fulfilling Promises, the Reparation of a Damage done through our own Default, and the Merit of Punishment among Men." GROTIUS, THE RIGHTS OF WAR AND PEACE, *supra* note 19, at 85–86; BUCKLE, *supra* note 45, at 19–20.

154. See *supra* Sections VII and V respectively.

155. Murphy, *supra* note 35, at 480.

156. Dufour, *supra* note 139, at 31 ("Grotius nous apparaît ainsi d'abord comme l'exemple de l'homme d'ordre.") (author's translation).

157. According to Article 5 of UNCLOS, "the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State." UNCLOS, *supra* note 3, at art. 5.

158. For a more in-depth discussion of this argument, see Blanchette-Séguin, *supra* note 8, at 9–10.

son, fixed baselines are highly preferable for the maintenance of order in inter-State relationships. This opinion is also shared by Judge José Luis Jesus, former president of the International Tribunal for the Law of the Sea, who further added that promoting orderly international relations was the very purpose of UNCLOS:

If account is taken of the fact that one of the *main purposes of the 1982 Convention is to promote States' orderly relations* over oceans' resources and uses, then it would seem reasonable *for the sake of stability* that, once the baselines have been established and given publicity to, in accordance with relevant provisions of the 1982 Convention, such baselines should be seen as permanent baselines, irrespective of changes.¹⁵⁹

Second, despite their diverging opinions on the issue, authors seem to be unanimous in saying that tensions between States will inevitably arise if baselines were to be moved inland with coastlines as the sea level rises.¹⁶⁰ Since uncertainty is typically a fertile breeding ground for conflicts, and especially so when it pertains to territorial matters, it should be avoided whenever possible for the sake of peace. More specifically, in the context of rising sea levels, it would be surprising if coastal States decide in a uniform manner to reduce their territorial claims as their coastlines recede. As the effects of rising sea level materialize, States will have directly conflicting interests. While most coastal States will surely continue to claim maritime territory based on their old baselines, other States will want to benefit from the wider navigation and exploitation rights created by receding coasts. In addition, adjoining or opposite States may find themselves in a position to expand their own maritime territory because of the misfortune of their gradually flooded neighbouring States. Considering this highly sensitive situation likely to prompt threats to international peace and stability, it would be in the best interest of the

159. José Luís Jesus, *Rocks, New-born Islands, Sea Level Rise and Maritime Space*, in VERHANDELN FÜR DEN FRIEDEN. NEGOTIATING FOR PEACE: LIBER AMICORUM TONO EITEL 579, 602 (Jochen A. Frowein et al. eds., 2003) (emphasis added).

160. See, e.g., Caron, 1990, *supra* note 4, at 640–41; Lusthaus, *supra* note 112, at 114; Rayfuse, *supra* note 5, at 4; Clive Schofield, *Shifting Limits? Sea Level Rise and Options to Secure Maritime Jurisdictional Claims*, 4 CARBON & CLIMATE L. REV. 405, 413–14 (2009).

international community to opt for a regime of stable established baselines. As opined by Professor Rosemary Rayfuse, this option “would be consistent with, and significantly assist in, the promotion and achievement of the [UNCLOS] objectives of peace, stability, certainty, fairness, and efficiency in oceans governance.”¹⁶¹ Therefore, the fixed baselines thesis would significantly assist in the realistic achievement of the ideal of peace promoted by Grotius.

Finally, in addition to being consistent with Grotius’s general ideas of order and stability of property, the fixed baselines thesis is a rule that could prevent international conflicts. This alone may be—irrespective of the intrinsic legal merits of the rule—a sufficiently good policy reason to adopt the fixed baselines thesis. As detailed above, Grotius favored such an approach through his ambivalence *vis-à-vis* the concept of prescription (i.e., the role that the passage of time plays in the making and ending of certain rights) with respect to land rights. In a passage of *De jure belli ac pacis*, Grotius seems to be torn between accepting the concept of prescription, which he deems wrong, and the deleterious effects of not accepting it.¹⁶² On the one hand, Grotius takes the position that time, in itself, should not be regarded as a means of acquiring property. On the other hand, he acknowledges that the rejection of acquisitive prescription would create a significant risk of territorial conflicts between States, which is “contrary to the common Sense of Nations,”¹⁶³ noting:

A Great Difficulty arises here, concerning the Right of Prescription. For whereas this Right receives its Being from the Civil Law, (Time, as such, having no Power to produce any Thing, for nothing is done by Time, tho’ every Thing be done in Time) in *Vasquez’s* Opinion, it cannot take Place between two free Nations . . . But if we should admit this to be true, a very great Inconvenience would follow; *the Disputes about Kingdoms, and their Boundaries, would never be at an End: Which as it directly tends to create Uneasiness, Trou-*

161. Rayfuse, *supra* note 5, at 6.

162. STUMPF, *supra* note 22, at 186.

163. GROTIUS, *THE RIGHTS OF WAR AND PEACE*, *supra* note 19, at 483–84.

*bles, and Wars amongst Men, so is it contrary to the common Sense of Nations.*¹⁶⁴

IX. EQUALITY OF STATES: A CONCEPT BEARING DIFFERENT MEANINGS

This note would be incomplete without addressing the concept of equality among States. Indeed, the rising sea level will affect States in a very different manner depending, *inter alia*, on whether they are coastal or land-locked, have steep or gradual shores, and whether they possess the technical and financial means to artificially prevent their coastal areas from being flooded.¹⁶⁵ For instance, Bangladesh, a poor and very low-lying country, could lose up to 10% of its land territory due to a rise of only three feet of the mean sea level.¹⁶⁶ For its part, the Netherlands, a rich low-lying country, is able to invest billions of dollars to build massive seawalls and storm surge barriers.¹⁶⁷ Because wealthy countries will be in better positions to protect their shores, the moving baselines thesis is susceptible to increasing the existing inequalities between States.

Given this disparity based on the economic and geographic positions of countries, there is an intuitive equality argument supporting the fixed baselines thesis.¹⁶⁸ Indeed, under this model, the current repartition of territories and resources between States would be preserved. It is also notewor-

164. GROTIUS, *THE RIGHTS OF WAR AND PEACE*, *supra* note 19, at 483–84 (second emphasis added).

165. See Caron, 1990, *supra* note 4, at 629; Caron, 2009, *supra* note 5, at 10; Soons, *supra* note 2, at 222.

166. Charles Di Leva & Sachiko Morita, *Maritime Rights of Coastal States and Climate Change: Should States Adapt to Submerged Boundaries?*, 5 L. & DEV. WORKING PAPER SERIES 1, 8–9 (2008).

167. See Chris Bentley, *As Sea Level Rise, Rotterdam Floats to the Top as an Example of How to Live with Water*, PRI'S THE WORLD (June 20, 2016, 3:30 PM), <https://www.pri.org/stories/2016-06-20/sea-levels-rise-rotterdam-floats-top-example-how-live-water>.

168. See Blanchette-Séguin, *supra* note 8, at 15 (“Compte tenu de l'intérêt primordial que pourraient avoir les États à conserver l'actuelle allocation des ressources naturelles maritimes et considérant le fait que l'élévation du niveau de la mer affectera les différents États de façon hautement inégale en raison de leurs disparités géographiques et économiques, [l'auteure est] d'avis que l'application du principe d'équité jouera en la faveur de l'État souhaitant conserver les lignes de base existantes.”), 18 (discussing economic and geographical disparities).

thy that fixed baselines would not detrimentally affect the existing rights of landlocked States since the maritime territories of coastal States will only expand at the same rate as the shorelines retreat, leaving therefore the size of the high seas unchanged.¹⁶⁹

In addition to the modern doctrine of territorial sovereignty, the Peace of Westphalia formally introduced the fundamental concept of sovereign equality of States¹⁷⁰ that is now enshrined in Article 2(1) of the Charter of the United Nations.¹⁷¹ Perhaps for this reason, Grotius has often been viewed, probably inappropriately, as an advocate of State equality.¹⁷² The reasoning leading to this conclusion has been articulated by Professor Hidemi Suganami as follows:

In [Grotius's] view all sovereign states are bound by international law. And since if all sovereign states are bound by international law, they cannot but all be equally so bound, Grotius must be said to have committed himself to the idea of the equality of all sovereign states *before* international law.¹⁷³

However, it is important to understand that Grotius did not suggest that all States have the same rights, but rather that they all have, at most, "an equal capacity for rights."¹⁷⁴ The principle of equality of States finds much of its support in subsequent writers rather than in Grotius's work *per se*. This may be explained by the fact that Grotius lived in a highly hierarchical world "inhabited not by atomized sovereign states . . . but by kings (sometimes States headed by kings) of varying strengths and prestige, as well as by pirates, brigands, tyrants, and infidels."¹⁷⁵ In addition, it is interesting to note that Grotius considered the State as an association, not of all its citizens,¹⁷⁶ but of "heads of families" (i.e., fathers).¹⁷⁷

169. Caron, 1990, *supra* note 4, at 648.

170. SHARMA, *supra* note 31, at 6.

171. U.N. Charter art. 2, ¶ 1.

172. EDWIN D. DICKINSON, EQUALITY OF STATES IN INTERNATIONAL LAW 34 (1920); Suganami, *supra* note 43, at 221.

173. Suganami, *supra* note 43, at 225.

174. *Id.* at 226-27. It is, however, contested that even this basic proposition can be found in Grotius's work, either directly or by "necessary implication." DICKINSON, *supra* note 172, at vii, 34.

175. Suganami, *supra* note 43, at 230.

176. *Id.* at 229.

Grotius recognized the inequality in fact and in power between States (or sovereigns) and did not see international law as a means to attenuate the harshness of this reality. For this reason, although there is certainly a strong equality argument based on equity to be made in favor of the fixed baselines thesis, this argument does not find much support in Grotius's oeuvre.

X. CONCLUSION

It would have doubtlessly been preferable for the drafters of UNCLOS to include a clear and explicit rule establishing the fixed or moving character of baselines. However, faced with ongoing and implacable sea level rise, the international community must cope with the actual text of the convention and provide an answer to the question left open in 1982.

Grotius lived in a time when anthropogenic climate changes were inconceivable. Nevertheless, this Note draws on his teachings containing timeless wisdom. Perhaps because it was meant to be immutable and universally applicable, the Grotian law of nature still conveys a strong message in favor of order and peace which requires us to return to the underlying goals of international law. Beyond the complex intricacies of the rules provided in the articles of UNCLOS, the *raison d'être* of the concept of territory is to allocate spatial jurisdiction between States so that it is possible to determine with certainty the legal regime applicable to a specific point in space. The achievement of this goal requires stability of borders.

Throughout Grotius's oeuvre, stability is an essential pillar for the peaceful cohabitation of all international actors. It is especially important in territorial matters which are often at the heart of States' concerns. Stability clearly points toward an interpretation of UNCLOS that allows for the preservation of territorial status quo and avoids a constant reshaping of boundaries that would likely fuel international conflicts. In my view, this fundamental principle of stability shows that fixed boundaries are the most appropriate solution to the thorny baselines question.

177. GROTIUS, *THE RIGHTS OF WAR AND PEACE*, *supra* note 19, at 552.